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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 219

WILLIAM CHARLES JASON, JR., *Petitioner,*

v.

ARTHUR E. SUMMERFIELD, ET AL., *Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

GEORGE M. JOHNSON,
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In The

Supreme Court of the United States

October Term, 1954

No. .....

William Charles Jason, Jr., *Petitioner,*

v.

Arthur E. Summerfield, Et Al., *Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above case on June 10, 1954.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals have not yet been reported but are set out in the Appendix. The District Court in granting the Government's motion to dismiss rendered no opinion. However, in an earlier related action between petitioner and these respondents (or their predecessors in office) the District Court did render an opinion (*Jason* v. *Alger, et al.*, 1952,

104 F. Supp. 653) which is set forth in the Appendix, infra p. 1.

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1954 (R. 60). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The Court of Appeals has held herein that petitioner, a postal clerk who has been employed as a classified civil service employee since 1923 in the Philadelphia Post Office, who was served in 1948 with a Notice of Proposed Removal Action on loyalty grounds containing ten specific charges, to which he made answer and after successive administrative hearings, received in 1950, a favorable determination by the Loyalty Review Board in the Civil Service Commission, may nonetheless be removed from his position by executive action on loyalty grounds predicated on those same ten specific charges and that such executive action does not violate any of petitioner's legally protected rights.

The questions presented are:

1. Whether the Government, after a final Loyalty Review Board decision that reasonable grounds did not exist to believe that petitioner was disloyal, could nonetheless discharge him from the classified civil service on loyalty grounds based upon the identical charges of which petitioner was previously cleared, where no authorization for a re-adjudication is provided for in the controlling Executive Order.

2. Whether the Court below erred in construing Executive Order 10241, amendatory to Executive Order 9835, as authorizing repeated administrative adjudications on identical charges in removal actions from the classified civil service on loyalty grounds.

3. Whether the Court below erred in failing to hold that Loyalty Review Board Memorandum No. 66 was void insofar as it directed a re-adjudication of petitioner's loyalty based on the same charges of which he had been cleared by previous administrative determination.

4. Whether the Court below erred in holding that petitioner failed to state a claim upon which relief may be granted, where the facts alleged show petitioner to be a permanent classified civil service employee with full status for thirty years and the removal action is grounded upon a directive of an executive administrative agency the invalidity of which is alleged.

5. Whether the Court below erred in holding that the standard for loyalty discharges provided in Executive Order 10241, to wit,

> "There is a reasonable doubt as to the loyalty of the person involved . . ."

presents a markedly different legal situation from the standard theretofore provided in Executive Crder 9835, which was,

> "Reasonable grounds exist for belief that the person involved is disloyal . . ."

STATUTES, EXECUTIVE ORDERS AND REGULATIONS INVOLVED

The pertinent parts of Executive Order 9835, the entire text of Executive Order 10241, and of Loyalty Review Board Memorandum No. 66 are set forth in the Appendix, infra pp. ——.

STATEMENT OF THE CASE

Since 1923 petitioner has been a postal clerk in the Philadelphia Post Office. In 1948 he was served with a Notice of Proposed Removal Action on loyalty grounds

containing ten specific charges, pursuant to the provisions of Executive Order 9835 (12 F.R. 1935). He answered the charges and requested a hearing thereon. Successive administrative hearings ensued, culminating in a finding in 1950 by the Loyalty Review Board in the Civil Service Commission, that reasonable grounds *did not exist* for believing petitioner to be disloyal to the Government of the United States. In 1952 petitioner was again served with a Notice of Proposed Removal Action on loyalty grounds containing the same ten specific charges in identical language. Petitioner sought to enjoin this second adjudication of his loyalty but his suit was dismissed by the District Court for failure to exhaust the administrative remedies. (*Jason* v. *Alger, et al., supra.*) Again successive administrative hearings ensued, this time, however, culminating in a finding by the Loyalty Review Board that *a reasonable doubt exists* as to the loyalty of petitioner. Authority to conduct this readjudication is claimed by the Government to be found in Executive Order 10241 (16 F.R. 3690), an ad interim amendment in 1951 to Executive Order 9835 which changed one sentence in that Order, substituting the "reasonable doubt" test for the "reasonable grounds" test as the standard for loyalty discharges; and a directive issued as Memorandum No. 66 by the Loyalty Review Board directing the executive heads to re-adjudicate under the "new standard" all "cases reversed on appeal." Executive Order 10241 and Loyalty Review Board Memorandum No. 66 are set out in the Appendix.

Petitioner filed the present suit in the District Court seeking a declaration of his rights under Executive Order 9835 as amended by 10241, a declaration that Loyalty Review Board Memorandum No. 66 was unauthorized and void as applied to petitioner, and an order restoring him to his position. The District Court dismissed the complaint on two grounds: failure to state a claim upon which relief could be granted, and lack of jurisdiction over the subject matter of the suit.

The District Court had jurisdiction under the District of Columbia Code, Title 11, Secs. 301, 305 and 306; and the Act of June 25, 1948, c. 646, 62 Stat. 930 (28 U.S.C.A. 1331, 1332); and 62 Stat. 964, as amended (28 U.S.C.A. 2201, 2202); and Rule 57 of the Federal Rules of Civil Procedure. As above indicated, the Court of Appeals held that the District Court did have jurisdiction.

The majority of the Court of Appeals while finding that the District Court was in error in deciding that it was without jurisdiction of the subject matter, affirmed the decision of the District Court that petitioner's complaint failed to state a claim upon which relief may be granted. The majority are of the opinion that there should not be "an extension of the principle of res judicata to administrative proceedings" (R. 51) and that in any event the amendment of the standard in the Executive Order caused a "markedly different legal situation" to be presented and moreover there is no vested right in federal employment. (R. 52, 54.)

The dissenting Judge takes the view that since no Executive Order, but only a memorandum of the Loyalty Review Board undertook to authorize repeated adjudications on identical loyalty charges, that "wholly apart from any possible question of res judicata, nothing less than express language in a Statute or Executive Order should be regarded as authorizing such repeated investigations." (R. 59.)

REASONS FOR GRANTING THE WRIT

The Court below has decided an important question of federal law which has not been, but should be, decided by this Court. It has been said that no person has a constitutional right to federal employment, but it has never been held that a person may be deprived of federal employment illegally.

Thousands of federal employees will be affected directly or indirectly by the decision of the Court below. The record does not include statistics from which the exact number

may be determined, but apparently the Court below took judicial notice that "there were some 9300 individuals involved." (R. 55.)

The appellant's reputation and ability to earn a livelihood are seriously injured by the governmental action taken without express authorization of any Congressional Act or Presidential Executive Order, which action is nevertheless sustained by the decision of the Court below.

The decision of the Court below that the governmental action complained of, prosecuted without express authority, does not present a justiciable issue, is at variance with the legal conclusions of members of this Court, enunciated in *Joint Anti-Fascist Committee* v. *McGrath,* 1951, 341 U.S. 123. Moreover, the decision of the Court below, in rejecting the extension of the principle of *res judicata* to administrative proceedings, is in conflict with the decision of the United States Court of Appeals for the Second Circuit in *U. S.* v. *Ex Rel Strachey* v. *Reimer, Commissioner of Immigration,* 1939, 101 F. (2d) 267, and, as well, the decision of this Court in *United States* v. *Atkins,* 1922, 260 U.S. 220.

In the *Strachey* case the relator, a British subject had applied for and received a passport visa from the American Consul in London. Later the Consul on advice, apparently from our State Department, sought to revoke the visa and advised the immigrant to delay his departure. Strachey refused and presented himself at New York where immigration authorities refused to honor his visa on the ground that he was politically unacceptable and had obtained his visa through fraud. After administrative hearing the visa was cancelled and an exclusion order issued. Reversing an order of the District Court dismissing a writ of habeas corpus, the Court of Appeals for the Second Circuit stated:

> "The question before us is whether the Consul had power to revoke the visa after he had issued it and the relator had embarked for the United States. We think that the Consul had no such power and that the order dismissing the writ should be reversed with di-

rections to grant a hearing as to the admissibility of the alien." (101 F. (2d) 267, 269 (C.A. 2).)

It is respectfully submitted that the decision of this Court enunciated in *United States* v. *Atkins, supra,* fully supports petitioner's contention that respondents made a final administrative determination of petitioner's loyalty with respect to specific charges, in an adversary proceeding after notice and hearing pursuant to the provisions of Executive Order 9835. It is further submitted that the majority of the Court below are in error in refusing to apply the principle of *res judicata* to this final administrative determination with respect to the specific charges there adjudicated. The majority of the Court below rely upon this Court's decision in *Wilbur* v. *United States,* 1930, 281 U.S. 206, but it is submitted that the *Wilbur* decision, which distinguishes the *Atkins* decision, is inapplicable for the reason, among others, that the *Wilbur* case involved intervening facts, whereas the case at bar is concerned with specific charges relating to acts, all of which allegedly occurred before the first administrative adjudication.

The wide-spread utilization of the doctrine of *res judicata* in administrative proceedings can be illustrated by examples from state jurisprudence, where judicially the problem has been treated more frequently than in the federal courts.[1] An administrative determination of facts material to issuance of securities has been held final and conclusive in subsequent proceeding for issuance of other securities by same applicant (*Petitions of the New Hampshire Gas and Electric Co.*, 1936, 88 N.H. 50, 184 Atl. 602). In the following problem areas the doctrine of *res judicata* has been applied: *Goodspeed* v. *Great Western Power Co. of Calif.*, 1938, 33 Cal. App. (2d) 245, 91 P. (2d) 623 (administrative adjudication of status as public utility); *Scioto Valley*

[1] See E. H. Schopflocher, "The Doctrine of Res Judicata in Administrative Law" (1942), 17 Wis. L.R. 5, 198; also "Res Judicata in Administrative Law" (1940), 49 Yale L.R. 1250.

Railway and Power Co. v. *Public Utilities Com. of Ohio*, 1927, 117 Ohio St. 64, 187 N.E. 425 (propriety of a carrier using a certain type of vehicle); *London Guarantee and Accident Co.* v. *Industrial Com.*, 1925, 78 Colo. 478, 242 Pac. 680 (issue of who is sole dependent of deceased employee under Workmen's Compensation Act); *Miller* v. *Copeland's Estate*, 1925, 139 Miss. 788, 104 So. 176 (hasty administrative action based on inadequate information deemed of minor importance as against convenience and certainty accruing from *res judicata* principle); *Olive Proration Co.* v. *Agricultural Prorate Com.*, 1941, 17 Cal. (2d) 204, 109 P. (2d) 918 (in absence of provision allowing a commission to change its determination courts usually have denied right to do so); *Miles, et al.* v. *McKinney*, 1938, 174 Md. 551, 199 Atl. 540 (denying power of Licensing Commission to reopen a prior determination).

It is submitted that the rejection by the Court below of this salutary principle of jurisprudence raises a serious policy question in regard to the fundamental fairness of federal executive procedures. This seriousness is heightened by the practical fact that the vast majority of law suits contesting the validity of federal executive action are necessarily filed in the District Court for the District of Columbia which Court will, of course, be constrained to follow the holdings of the Court below in initially determining whether a cause of action is stated.

Quite apart from any question of *res judicata*, the whole question of the administration by the executive department of the federal employee loyalty program is doubt-ridden and unclear with a natural concomitant of lowered morale and increased insecurity of those in the public service. The lower federal courts have attempted unsuccessfully to mark out with clarity the limits to be judicially drawn about the use of executive power in relation to government employees. Since the commencement of World War II, successive Executive Orders have sought to deal with the problem of protecting the Government from the retention in federal

employment of persons who are disloyal to the Government. The Executive Orders herein considered have since been replaced by another which in some respects seeks to cure some of the more glaring procedural defects observable in the earlier orders yet poses additional problems anew. If this Court grants the writ sought in this cause it will not have before it any question of invalidation of a Presidential Order. Here, petitioner does not challenge the power of the President to make loyalty a condition of government employment and to prescribe the procedures to be followed by the heads of executive departments in determining whether that condition has been met. Likewise, petitioner does not challenge the procedural propriety of the prior adjudication rendered pursuant to the unamended provisions of Executive Order 9835 which this Court had before it in *Bailey* v. *Richardson*, 1951, 341 U.S. 918. While petitioner is not suggesting that the procedure had under Executive Order 9835, afforded him due process of law, it did result in his acquittal of the charge of disloyalty to the Government of the United States. In simplest terms it is petitioner's position that basic legal concepts forbid that the Postmaster General may ignore that final determination, readjudicate the same charges, reach a contrary result the second time and remove petitioner from his position, all without authority so to do derived from any Act of Congress or Executive Order, but merely a memorandum of the Loyalty Review Board.

The majority of the Court below recognizing the absence of authorization in the Executive Orders of repeated loyalty adjudications, seeks to differentiate the old and new standards for removal on loyalty grounds in an effort to justify their conclusion that this was not a retrial of the same issue. The majority opinion argues that "reasonable grounds for belief of disloyalty" and "reasonable doubt as to loyalty" are quite different tests and that the latter is a "more rigid test." It may be significant to observe in connection with this problem in semantics that the ma-

jority opinion of that same Court speaking in *Bailey v. Richardson*, 1950, 182 F. (2d) 46, used the two standards interchangeably. It stated:

> "The first proposition is in effect that *reasonable ground for belief of disloyalty* is not sufficient prerequisite to dismissal. But we can perceive no basis for holding that the executive departments must retain in the service *those whose loyalty is reasonably doubtful.*" (182 F. (2d) 61, emphasis supplied.)

Citation of the foregoing excerpt is not intended as carping criticism, rather it is offered as supportive of the view that in these two standards we have a distinction without difference in substance. Once an adjudication has been made that reasonable grounds do not exist for a belief of disloyalty it is difficult to conceive of the remaining existence of a *reasonable* doubt as to loyalty. A groundless doubt would indeed be an unreasonable doubt indistinguishable from "unfounded accusations," reliance upon which is interdicted by the express provisions of Executive Order 9835. It would be unrealistic to ignore the fact that administration of these orders and thus interpretation of the meaning of these standards was entrusted to loyalty boards composed of non-lawyers. Nowhere do the Executive Orders define or clarify the standards and the President did not indicate his reason for amending the Order or what he contemplated by the use of the changed wording in one sentence of his Order. Certain it is that reasonable men may well differ on the significance of supposed differentiations between "reasonable doubt" and "reasonable grounds."

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1022-52.

WILLIAM C. JASON, JR., *Plaintiff*,

v.

GEORGE W. ALGER, ET AL., *Defendants*.

MEMORANDUM OF COURT

In this case, plaintiff seeks to enjoin defendants from proceeding to readjudicate the issue of plaintiff's loyalty to the Government of the United States, as has been proposed in a "Notice of Proposed Removal Action," dated January 10, 1952. Defendants have moved to dismiss.

Plaintiff, a clerk in the Post Office Department, was served, by the Post Office Department Loyalty Board, on or about September 24, 1948, with "Notice of Proposed Removal Action," in which it was claimed that, "as a result of a recent investigation of you (plaintiff) . . . reasonable grounds exist for belief that you are disloyal to the Government of the United States." At that time, Executive Order 9835, 12 F.R. 1935, set the standard for determining the loyalty of an employee of the United States, providing that reasonable grounds must exist for belief that the person involved was disloyal to the Government of the United States. On September 6, 1949, the Post Office Department Loyalty Board held that "reasonable grounds exist to believe that you (plaintiff) are disloyal to the Government of the United States." Plaintiff was suspended from his position pending appeal. These findings and recommendations were affirmed, on appeal to the Postmaster General, on May 1, 1950.

Plaintiff then appealed to the Loyalty Review Board,

which reversed the action of the Postmaster General and ordered plaintiff restored to his position. This action was taken on November 2, 1950, the order of the Loyalty Review Board advising that a panel of the members of that Board had "reviewed the entire record and reached the conclusion that reasonable grounds do not exist to believe that Mr. Jason is disloyal to the Government of the United States."

On May 1, 1951, Executive Order 9835 was superseded by Executive Order 10241, 16 F.R. 3690. This latter order, in effect, amended the standard for refusal of or removal from employment from Government service on grounds relating to loyalty, and that Order provides that removal may take place where "there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

Thereafter, on May 23, 1951, the Loyalty Review Board issued its Memorandum No. 66, which directed Departmental Loyalty Boards to adjudicate under the new standard in cases where unfavorable determinations made by any Board were reversed on appeal.

On January 10, 1952, "Notice of Proposed Removal Action," which asserted that, on the basis of an investigation made of plaintiff, there was "a reasonable doubt as to your (plaintiff's) loyalty to the Government of the United States," was served on plaintiff by the Post Office Department Loyalty Board, and this action followed. Up to the time of hearing of the motion in this case, no other or further action had been taken, other than the service of the Notice of January 10, 1952.

Two serious questions arise in this case: first, whether the doctrine of *res judicata* is applicable, that is, whether the matter having been once adjudicated, plaintiff can be called upon again to establish his loyalty, this time under the new standard fixed by Executive Order 10241; and, secondly, whether the action is premature in that plaintiff has failed to exhaust his administrative remedies.

Certainly there has been no action by the Post Office De-

partment Loyalty Board under the Notice of January 10, 1952, and, naturally, no appeal has been or could be taken to the Postmaster General, or to the Loyalty Review Board.

"It seems to the Court that, under the general rule as to exhaustion of administrative remedies, plaintiff's suit is premature. It may be that he will be vindicated by the administrative tribunals, or that those tribunals will rule favorably on his contention that the doctrine of *res judicata* is applicable, in either of which events no need would exist for resort to the Court. Courts have no right to anticipate the final administrative decision. Plaintiff must await the exhaustion of his administrative remedies."

Because a serious question does exist under the other ground mentioned, the Court will dismiss the complaint without prejudice of plaintiff's right to file another suit if and when a decision adverse to him is rendered in the administrative process. In other words, the decision of the Court in this case is not to be *res judicata* on the question of the right of plaintiff to file another suit at that time, particularly where, as here, it has been conceded by the Government that the action taken by the Post Office Loyalty Board is based on the same grounds which were the subject of the previous proceeding originally undertaken in 1948.

The motion to dismiss the complaint will be granted.

Settle judgment on notice.

WALTER M. BASTIAN,
Judge.

April 28, 1952.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2252-53.

WILLIAM C. JASON, JR., *Plaintiff*,

v.

ARTHUR E. SUMMERFIELD, ET AL., *Defendants*.

ORDER

This cause having come on to be heard on defendants' motion to dismiss, and it appearing to the Court that it is

without jurisdiction of the subject matter, and it further appearing that the complaint fails to state a claim upon which relief may be granted it is by the Court this 8th day of July, 1953,

ORDERED that the complaint be, and the same is hereby, dismissed.

ALEXANDER HOLTZOFF,
Judge.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,904.

WILLIAM C. JASON, JR., APPELLANT,

v.

ARTHUR E. SUMMERFIELD, Postmaster General of the United States, et al., APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided June 10, 1954.

Mr. Howard Jenkins, Jr., for appellant.

Mr. Joseph A. Rafferty, Jr., Assistant United States Attorney, with whom *Messrs. Leo A. Rover*, United States Attorney, and *Lewis A. Carroll*, Assistant United States Attorney, were on the brief, for appellees. *Mr. William J. Peck*, Assistant United States Attorney at time record was filed, entered an appearance for appellees.

Before EDGERTON, WILBUR K. MILLER and DANAHER, Circuit Judges.

DANAHER, *Circuit Judge*: Appellant Jason was discharged from the Post Office Department on loyalty grounds. He commenced this action seeking a declaratory judgment and injunctive relief, and from the District Court's order granting appellees' motion to dismiss, he brought this appeal. We are presented with the question whether the government after a Loyalty Review Board decision that reasonable grounds did not exist to believe the appellant disloyal under the standard set forth in Executive Order No. 9835, 12 F.R. 1935, 3 C.F.R. (Supp. 1947), could later, on the same charges, re-examine and determine his loyalty status according to a different standard contained in Executive Order No. 10241, 16 F.R. 3690, 3 C.F.R. 431 (Supp. 1951).

I

> *". . . reasonable grounds exist for belief that the person involved is disloyal. . . ."*

Appellant had been a classified civil service regular clerk in the Philadelphia, Pennsylvania, Post Office from 1923 until 1945 when he became a national officer of a labor organization recognized by the Post Office Department. Since 1949 he devoted full time to his organization duties, on leave without pay pursuant to Department permission.

In 1948 appellant was served with a Notice of Proposed Removal Action pursuant to the provisions of Executive Order No. 9835, setting forth certain charges of disloyalty to the government.[1]

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[1] The notice read in part: "As a result of a recent investigation made of you as an employee of the Post Office Department, under the provisions of the above-mentioned Executive Order, information has been received which indicates that you have been and that you are affiliated or sympathetic with an organization, association, movement, group, or combination of persons designated by the Attorney General as subversive, and on the basis of this evidence reason-

Appellant filed an answer, a hearing was held on February 28, 1949, and the Department Loyalty Board found, on September 6, 1949, that reasonable grounds did exist for belief that appellant was disloyal. An appeal was then taken to the Postmaster General who found after further hearing, that reasonable grounds existed for believing that appellant was disloyal. On appeal to the Loyalty Review Board in the Civil Service Commission it was concluded on November 2, 1950 that reasonable grounds did not exist for believing that appellant was disloyal. In reversing the rulings of the Department Loyalty Board and of the Postmaster General, the Loyalty Review Board construed and applied as the test or standard for removal the provision from Executive Order No. 9835 that "reasonable grounds exist for belief that the person involved is disloyal to the government of the United States." The Board recommended that appellant be restored to his position and the Postmaster General then concurred.

II

"There is a reasonable doubt as to the loyalty of the person involved...."

On April 28, 1951 Executive Order No. 9835 in one important particular, was amended by Executive Order No. 10241, but in all other respects was continued in full force and effect. The "reasonable grounds" standard was eliminated, and in lieu thereof the Order prescribed that the standard to be applied should read: "There is reasonable doubt as to the loyalty of the person involved to the government of the United States."[2] On May 23, 1951, the

able grounds exist for belief that you are disloyal to the government of the United States. . . ." Then followed ten specific charges in all, drafted according to the requirements of Title 5 U.S.C., §652 (1952).

[2] Actually this was not a new standard. The President simply readopted the standard of loyalty which had been applied throughout World War II and up to March 21, 1947

Loyalty Review Board issued its Memorandum No. 66 which provided: "Each department or agency loyalty board having jurisdiction shall adjudicate under the standard of Executive Order No. 10241 all loyalty cases in which unfavorable determinations made by any board were reversed on appeal prior to May 1, 1951, provided the individuals concerned are still employed in the department or agency."

Thereafter, pursuant to the quoted instructions the Department Loyalty Board served on the appellant, on January 10, 1952, a new Notice of Proposed Removal Action.[3] Appellant filed his answer, and after a hearing on

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when Executive Order No. 9835 was issued. War Service Regulation II, Section 18.2(c), 7 F.R. 7723 (1942), in pertinent part had provided:

> "An applicant may be denied examination and an eligible may be denied appointment for any one of the following reasons: * * *
>
> * * * *
>
> "(7) A reasonable doubt as to his loyalty to the Government of the United States; * * *
>
> * * * *
>
> "Any of the reasons stated in the foregoing subdivisions from (b) through (h) inclusive, shall be sufficient cause for removal from the service."

[3] This new notice apprised the appellant that the "new" standard as contained in Executive Order No. 10241 had been issued, that the Department Loyalty Board had been directed to reopen certain cases including that of the appellant, and then continued in pertinent part:

> "While your case was disposed of under the standard set forth in Executive Order No. 9835 and an investigation was heretofore made of you as an employee of the Post Office Department, an adjudication of your case is now required under the provisions of Executive Order No. 10241 and Loyalty Review Board Memorandum No. 66. The information received as a result of the investi-

May 5, 1952 before the Department Loyalty Board and a finding by the Board on August 7, 1952 that "there is a reasonable doubt as to your loyalty to the government of the United States," appellant appealed to the Postmaster General. On December 9, 1952 the Postmaster General issued a similar finding and affirmed the findings and recommendations of the Department Loyalty Board. The decision of the Loyalty Review Board after hearing on appeal, affirmed the decision of the Postmaster General on April 2, 1953, requested that appellant be separated from the service, and on April 10, 1953, appellant was notified of his removal from the Post Office Department. Appellant then commenced this action.

III

Appellant's principal contention is that the decision of the Loyalty Review Board in the 1949 hearing precluded re-examination in the 1952 hearing on the same charges under the standard set up in Executive Order No. 10241. We find this contention untenable. In *Churchill Tabernacle* v. *Federal Communications Commission,* 81 U. S. App. D.C. 411, 160 F. 2d 244 (D.C. Cir. 1947) we rejected an extension of the principle of *res judicata* to administrative proceedings. Speaking for this Court, Chief Justice Groner pointed out that it is well settled "that *res judicata* and equitable estoppel do not ordinarily apply to decisions of administrative tribunals. . . ." He cautioned

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gation previously made of you indicates that you have been or that you are affiliated or sympathetic with an organization, association, movement, group, or combination of persons designated by the Attorney General as subversive, and on the basis of this evidence there is a reasonable doubt as to your loyalty to the government of the United States. . . ."

Then followed the same ten specific charges which had been set forth in the earlier Notice of Proposed Removal Action. See note 1, *supra.*

against ["transplanting] into the realm of administrative law rules of procedure, trial and review which have evolved in the history and experience of courts." *Id.* at 413.

Even were we inclined to disregard the cogent observations of that distinguished jurist, and we are not, the language of the standard set out in Executive Order No. 10241 cannot be ignored. A markedly different legal situation was presented.[4]

When the Loyalty Review Board considered appellant's case under the standard found in Executive Order No. 9835, the ultimate fact which was the subject of inquiry was *disloyalty,* disloyalty to the government of the United States. The standard did not deal in terms with grounds which might have existed in the past for a finding that some person had at some earlier time been disloyal. Rather, the Board was bound in the exercise of prudence and caution to determine whether or not the facts and circumstances established a "belief" — that is, a present or immediate assurance of "disloyalty." The tense of the verbs used, "exist" and "is," was the present tense. The "reasonable grounds" had to be actually or really in being, *presently,* at the time of review. The "belief" was not some past belief but a then existent belief. The evidence, the mass of details, the facts and the inferences appropriately to be drawn therefrom had to be tested by the standard to be derived from the words employed to state it. Cumulatively all factors had to culminate in a justifiable conclusion of present disloyalty. It is not a simple matter now, nor was it in 1949 for any Board to say that a person involved is disloyal.

Quite different was the test which the Board was to apply under the prescription of Executive Order No. 10241:

> "The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that,

[4] Cf. State Farm Insurance Co. v. Duel, 324 U.S. 154, 162 (1945).

> on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

The Board's duty at the second review was thus to inquire whether or not on all the evidence there existed a reasonable basis for a present doubt. But that doubt, if any, was to operate in relation to an ultimate fact of *loyalty*, not disloyalty. The word "doubt" implies an unsettled state of opinion concerning the reality of an event, or the truth of an assertion, or as in this case, a doubt as to the loyalty of the person involved. Stated otherwise, the Board was no longer to be bound to inquire as to whether the proof reasonably was sufficient to convince and direct its understanding and to satisfy its reason and judgment as to disloyalty. Rather, the amended standard applied a more rigid test of suitability for government employment. It contemplated the possible existence of proof or information which, while not capable of inducing a belief that the person "is disloyal," does cause a reasonable doubt as to whether he is in fact loyal.

Appellant would have us say that the two standards mean the same thing, that the amended standard changed nothing, and he so argued, even as he hastened to assure us that he could not expect that the President would do a vain thing. Throughout World War II, the standard prescribed under Executive Order No. 10241 had prevailed. In 1947 the war-time standard was replaced by that provided in Executive Order No. 9835. Whether it was because of the war in Korea and the President's declaration of the existence of an emergency in 1951, or whether the President felt that the Board was placing a more narrow interpretation than he intended on the "present" disloyalty construction of Executive Order No. 9835 or for some other reason, the fact remains that he struck down the standard found in Executive Order No. 9835 and re-promulgated the World War II standard found in Executive Order No. 10241. The two are quite different,

both in language and in effect, and with appellant, we cannot say that the President did a vain thing.

Moreover, there is no vested right in federal employment, and except as restricted by law, the Executive must enjoy wide discretion in determining hiring and firing policies. See *Bailey* v. *Richardson*, 86 U.S. App. D.C. 248, 253, 259, 182 F. 2d 46 (D.C. Cir. 1950), *affirmed by an equally divided court*, 341 U.S. 918 (1951), and cases there cited. We can rightfully no more prevent the Executive from *reconsidering* the standards to be applied in determining the loyalty of federal employees than prescribe tests in the first place.

One point remains to be noticed. After Executive Order No. 10241 was issued April 30, 1951, the Loyalty Review Board promulgated on May 10, 1951 Memorandum No. 65 addressed to all executive departments and agencies on the subject of "reopening loyalty cases under Executive Order No. 10241 when an individual receives a new appointment in the federal service." The Board took note of the amended standard of Executive Order No. 10241 and advised of its program to review the case of an individual receiving a *new* appointment notwithstanding that previously as to such persons, "adjudications should not be subject to more than one adjudication on the same set of facts." Appellant was not a person receiving "a new appointment," so that he was not affected by Memorandum No. 65. One week was to pass before the Board met to consider its policy with reference to other categories of federal employees.

On May 17, 1951, the Loyalty Review Board met to consider cases such as that of the appellant as well as of federal employees falling into certain other categories. There were some 9300 individuals involved.

On May 23, 1951, the Loyalty Review Board issued Memorandum No. 66 to all executive departments and agencies on the subject "Adjudication under the Standard Established by Executive Order No. 10241 of Loyalty

Cases Determined and Closed Prior to May 1, 1951 under Executive Order No. 9835." The Memorandum recited: "The Loyalty Review Board took into consideration that under Article II, Section 2, of the Constitution of the United States, the Acts of Congress thereunder, and the decisions of the courts, heads of departments and agencies have the right to hire and fire employees. Accordingly, the Board recognized that department and agency heads have an inherent right to review any loyalty cases at any time in order to determine the qualifications of any individual for continued employment." The Board further pointed out that by Presidential order the head of each department and agency in the Executive Branch of the government was personally responsible for an effective program to assure that disloyal civilian employees are not retained in employment. Again, pursuant to Presidential order, the Board advised of its purpose to coordinate employee loyalty policies, to achieve uniformity of treatment.

It was against that background, that as to "cases reversed on appeal" the "new standard" was prescribed. The Memorandum also dealt with "cases reviewed in postaudit" and "other cases." Appellant's case clearly fell within the first category. The Board surely possessed authority to issue its Memorandum No. 65 to deal with an individual receiving a new appointment. It was equally within the Board's authority to issue its Memorandum No. 66 to deal with other categories such as that including the appellant's case. The Board correctly pointed out that the head of each department possesses an inherent right to review any loyalty cases.[5] Indeed, it is the con-

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[5] "The United States has the right to prescribe the qualifications of its employees and to attach conditions to their employment." *Friedman* v. *Schwellenbach*, 81 U.S. App. D.C. 365, 367, 159 F. 2d 22 (D.C. Cir. 1946), cert. denied, 330 U.S. 838 (1947) (which considered the very standard here involved). Moreover, Executive Order No. 9835 ex-

tinuing duty of any department or administrative agency to execute its function in such fashion as may be required to effectuate its purposes and to accomplish its objectives. Cf. *Wilbur* v. *United States*, 281 U.S. 206, 217 (1930). There, the Supreme Court considered the power of the Secretary of the Interior in 1927 to reconsider and revoke a decision made in 1919. Flatly ruling that there was no want of power in the circumstances, the Court continued: "The decision in 1919 was, not a judgment pronounced in a judicial proceeding, but a ruling made by an executive officer in the exertion of administrative authority. That authority was neither exhausted nor terminated by its exercise on that occasion, but was in its nature continuing. Under it the Secretary who made the decision could reconsider the matter and revoke the decision if found wrong; and so of his successor." Likewise, in *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953), where Congress had charged the National Labor Relations Board with the task of devising remedies to effectuate the policies of the Act, the Board was said to possess broad discretionary power. "In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." *Id.* at 346.

We have never heard it disputed that employees in fact disloyal to the government may and should be removed. We see no basis for holding that an executive department must retain in the service those whose loyalty is reasonably doubtful. Even under the standard set up by Executive Order No. 9835, the Department Loyalty Board and the Postmaster General had respectively found and affirmed that reasonable grounds existed for the belief that the appellant was disloyal. The President had promulgated that Executive Order as well as the standard here involved.

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pressly stated, Part II, par. 1, "The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency."

He had the undoubted right by a later Executive Order to define and proclaim the new standard in Executive Order No. 10241.[6]

"Reasonably grounded suspicion of disloyalty indicates a risk, and no concept of the Constitution requires the executive to endure recognizable and preventable risks in the administration of the law." *Bailey* v. *Richardson*,

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[6] This he did in these words:

EXECUTIVE ORDER 10241

AMENDING EXECUTIVE ORDER NO. 9835 ENTITLED "PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEE'S LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT"

By virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403) as amended, and section 9A of the act approved August 2, 1939 (5 U.S.C. 118j), and as President of the United States, it is ordered that paragraph 1 of Part V of Executive Order No. 9835 of March 21, 1947, entitled "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government," be, and it is hereby, amended to read as follows:

"1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

HARRY S. TRUMAN

THE WHITE HOUSE
April 28, 1951.

Cf. Executive Order No. 10450, 18 F.R. 2489 (April 27, 1953).

supra, at 263. Hundreds of thousands of persons in government employ whose loyalty is beyond the faintest shadow of suspicion inspire the admiration and respect of the public. All of us can feel more secure and believe it entirely just when procedures are evolved and applied by the Chief Executive to weed out and separate from government service those who are actually disloyal or those as to whom reasonably grounded suspicion of disloyalty exists. No person can be loyal to the political cause of some worldwide conspiratorial movement which plots and seeks the destruction of our form of government and still remain loyal to the American cause. We rule that the President was justified in prescribing as a standard for the refusal of employment or the removal from employment "that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

Appellant has not demonstrated, indeed he has not seriously urged, that the removal proceedings against him failed to conform with the procedural requirements of the civil service laws and regulations and the pertinent executive orders. Cf. *Williams* v. *Cravens,* —U.S. App. D.C. —, 210 F. 2d 874 (D.C. Cir. 1954) and cases there cited.

The District Court ordered that appellant's complaint be dismissed for failure to state a claim upon which relief may be granted. With this action we are in accord for the reasons already given. The District Court also decided that it was without jurisdiction of the subject matter and dismissed the compaint on that basis as well. This we think was error. Our own numerous decisions following challenges to the loyalty and other employee removal procedures permit no doubt as to the jurisdiction of the district courts to hear cases such as this. See e.g. *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947); *Kutcher* v. *Gray,* 91 U.S. App. D.C. 266, 199 F. 2d 783 (D.C. Cir. 1952); and *Deak* v. *Pace,* 88 U.S. App. D.C. 50, 185 F. 2d 997 (D.C. Cir. 1950). However, since

the complaint was properly dismissed for failure to state a claim for relief, the judgment of the District Court will be

Affirmed.

EDGERTON, *Circuit Judge, dissenting:* Since no Executive Order, but only a memorandum of the Loyalty Review Board, undertook to authorize repeated investigations of identical loyalty charges against a government employee, under old standards or new ones, the question whether an Executive Order could do so is not before us. Wholly apart from any possible question of *res judicata,* nothing less than express language in a statute or Executive Order should be regarded as authorizing such repeated investigations, since they gravely injure the employees concerned, shock the sense of justice and the sense of security of other persons in and out of government, and damage the government by lowering morale and by reducing the appeal of public service.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

April Term 1954

No. 11,904

WILLIAM C. JASON, JR., *Appellant,*

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, ET AL., *Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: EDGERTON, WILBUR K. MILLER, and DANAHER, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby affirmed.

Dated: June 10, 1954.

Per Circuit Judge Danaher.

Separate dissenting opinion by Circuit Judge Edgerton.

EXECUTIVE ORDER 9835

Prescribing Procedures for the Administration of an Employee Loyalty Program in the Executive Branch of the Government

• • • • • • • • • • •

WHEREAS maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

• • • • • • • • • • •

Part II. Investigation of Employees

2(a). An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

(b). The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him

in sufficient detail, so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit, and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board, and (3) of his right to appear before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing department or agency or to such person or persons as may be designated by such head, under such regulations as may be prescribed by him, and the decision of the department or agency concerned shall be subject to appeal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation.

• • • • • • • • • • •

Part III. Responsibilities of Civil Service Commission

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

(a). The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

(b). The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

• • • • • • • • • • •

Part V. Standards

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

• • • • • • • • • • •

Part VI. Miscellaneous

3. The provisions of this order shall not be applicable to persons summarily removed under the provisions of section 3 of the act of December 17, 1942, 56 Stat. 1053, of the act of July 5, 1946, 60 Stat. 453, or of any other statute conferring the power of summary removal.

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HARRY S. TRUMAN.

EXECUTIVE ORDER 10241

Amending Executive Order No. 9835 Entitled "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government."

By virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403) as amended, and section 9A of the act approved August 2, 1939 (5 U.S.C. 118j),

and as President of the United States, it is ordered that paragraph 1 of Part V of Executive Order No. 9835 of March 21, 1947, entitled "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government," be, and it is hereby, amended to read as follows:

> "1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

HARRY S. TRUMAN.

The White House,
April 28, 1951.

LOYALTY REVIEW BOARD MEMORANDUM NO. 66, MAY 23, 1951

To All Executive Departments and Agencies:

Subject: Adjudication under the Standard Established by Executive Order No. 10241 of Loyalty Cases Determined and Closed Prior to May 1, 1951, under Executive Order No. 9835.

The Loyalty Review Board met in Washington, D. C., May 17, 1951, for the purpose of establishing a policy with respect to the application of Executive Order No. 10241 of April 28, 1951, to the cases of individuals who had been found eligible for Federal employment after complete investigation by the Federal Bureau of Investigation since the beginning of the Federal Employees' Loyalty Program on October 1, 1947, to the effective date of Executive Order No. 10241, of which there are approximately 9,300.

The Loyalty Review Board took into consideration that under Article II, Section 2, of the Constitution of the United States, the Acts of Congress thereunder, and the decisions of the courts, heads of departments and agencies have the right to hire and fire employees. Accordingly,

the Board recognized that department and agency heads have an inherent right to review any loyalty cases at any time in order to determine the qualifications of any individual for continued employment.

Moreover, the President of the United States, in Executive Order No. 9835, Part II, paragraph 1, has stated: "The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency." The department and agency heads play a vital role in this program.

The Board also recognized its responsibilities under Part III, paragraph 1c(3) of Executive Order No. 9835, wherein it is stated that the Loyalty Review Board shall "coordinate the employee loyalty policies and procedures of the several departments and agencies." The Board recognized that several departments and agencies look to the Loyalty Review Board to prescribe a method to insure uniform treatment of all cases.

In accordance with the basic principles stated above, the Loyalty Review Board decided that Executive Order No. 10241 should be applied as follows to cases in which favorable decisions were made prior to May 1, 1951 under the former standard of Executive Order No. 9835.

1. Cases reversed on appeal

Each Department or Agency Loyalty Board having jurisdiction shall adjudicate under the standard of Executive order No. 10241 all loyalty cases in which unfavorable determinations made by any board were reversed on appeal prior to May 1, 1951, provided the individuals concerned are still employed in the department or agency.

The Department and Agency Loyalty Boards shall forward immediately to the Loyalty Review Board a list showing the names of all cases in which unfavorable determinations were reversed on appeal, including those of indi-

viduals who are no longer employed in such department or agency. The complete files in cases of persons no longer employed in the department or agency shall be forwarded to the Loyalty Review Board, showing the date and reason for separation. In cases of persons who have transferred to other departments or agencies, the date of transfer and the department or agency to which transfer was made shall be shown. The Loyalty Review Board shall forward the files to the department or agency where such individuals are presently employed.

The Loyalty Review Board shall obtain and forward to the employing department or agency the files in those cases originally adjudicated by the Regional Loyalty Boards of the Civil Service Commission.

2. Cases reviewed in post-audit

The Department and Agency Loyalty Board shall adjudicate under the standard established by Executive Order No. 10241 cases in which favorable decisions were made under Executive Order No. 9835 but in which the evidence was sufficiently derogatory to warrant a review of the case by a panel of the Loyalty Review Board in its post-audit program.

Since the Department and Agency Loyalty Boards have no means of knowing what cases were so reviewed by panels of the Loyalty Review Board, the names of such cases will be sent to the Department or Agency Loyalty Boards by the Loyalty Review Board together with the files if the department or agency does not already have them.

When the names are furnished by the Loyalty Review Board, the cases shall be adjudicated on the complete file by the Department or Agency Loyalty Boards under the standard established by Executive Order No. 10241 in accordance with the Directives of the Loyalty Review Board.

3. Other cases

The Department or Agency head shall call up for adjudication under the standard established by Executive Order No. 10241 any other case within his jurisdiction which he determines should be reviewed in order to assure himself that there is no person in his employ concerning whose loyalty to the Government of the United States there is a reasonable doubt, under the standard established by Executive Order No. 10241. Particular attention shall be given to those cases in which a hearing was held.

In cases in which hearings were held under Executive Order No. 9835 but the individual concerned is no longer employed, the Department or Agency Loyalty Board shall furnish immediately to the Loyalty Review Board the names and complete files of such cases. If such individual is presently employed elsewhere in the Government service, the file shall be sent to his employer.

The Loyalty Review Board will forward to the employing agency the files in those cases where hearings were held by the Regional Loyalty Boards of the Civil Service Commission.

* * * * * * * * * *

When a favorable decision is made under the standard established by Executive Order No. 10241 in any of the foregoing cases, the Department or Agency Loyalty Board shall submit to the Loyalty Review Board a Standard Form 98, plainly marked "Reopened under E.O. 10241." The Loyalty Review Board shall then post-audit the case.

If, after review of the complete file, unfavorable action under the standard established by Executive Order No. 10241 appears to be warranted in any of the foregoing cases, the individual shall be given all of his rights under Executive Order No. 9835, as amended, including a notice of charges and proposed removal action, hearing, and the rights of appeal to the head of the department or agency and to the Loyalty Review Board.

Cases adjudicated under the standard established by Executive Order No. 10241 in accordance with this memorandum shall be reported in the monthly "Agency Progress Report on Loyalty Cases" in the same manner as new cases received under Item i, "Cases Received by Agency," and included with reopened cases in the footnote reference to Item 1, "Cumulative to date," total. See Memorandum No. 20, Revised, dated March 9, 1949, To All Executive Departments and Agencies.

(S) HIRAM BINGHAM, *Chairman,*
Loyalty Review Board.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 219

WILLIAM CHARLES JASON, JR., PETITIONER

v.

ARTHUR E. SUMMERFIELD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the United States District Court for the District of Columbia was entered without opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 47) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1954 (R. 60). The petition

for a writ of certiorari was filed on July 16, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there is a difference in substance between the standard prescribed by Executive Order 9835 for removal from Federal employment, *i.e.*, "reasonable grounds exist for belief that the person involved is disloyal," and the standard prescribed by Executive Order 10241 (which amended Executive Order 9835), *i.e.*, "there is a reasonable doubt as to the loyalty of the person involved."

2. Whether the Loyalty Review Board was empowered under Executive Order 9835, as amended by Executive Order 10241, to issue Memorandum No. 66, which directed the readjudication of cases previously determined under the superseded standard.

3. Whether the principle of *res judicata* precluded re-examination of petitioner's eligibility for continued employment under the standard prescribed by Executive Order 10241 after a decision favorable to petitioner had been rendered under the standard prescribed by Executive Order 9835.

EXECUTIVE ORDERS AND REGULATIONS INVOLVED

1. Executive Order 9835 (12 F.R. 1935) provided in pertinent part that:

> The standard for the refusal of employment or the removal from employment in an execu-

tive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Executive Order 10241 (16 F.R. 3690), which amended Executive Order 9835, provided, in pertinent part, that:

> The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States.

3. Loyalty Review Board Memorandum No. 66, dated May 23, 1951, provided, in pertinent part, as follows (Pet. App. 20-24):

> Each Department or Agency Loyalty Board having jurisdiction shall adjudicate under the standard of Executive order No. 10241 all loyalty cases in which unfavorable determinations made by any board were reversed on appeal prior to May 1, 1951, provided the individuals concerned are still employed in the department or agency.

STATEMENT

Executive Order 9835 (12 F.R. 1935), establishing standards and machinery for determining the

loyalty of Federal employees, was issued by the President on March 31, 1947. It provided for the investigation of all persons employed by the Federal Government or applying for such employment, for the establishment of Loyalty Boards in each department and agency, and for the establishment within the Civil Service Commission of a Loyalty Review Board.

The order required the head of each department and agency to institute "an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency" and made him "personally responsible" therefor (Part II, Par. 1). The Loyalty Review Board was empowered to review cases involving persons recommended for dismissal on grounds relating to loyalty "and to make advisory recommendations thereon to the head of the employing department or agency." (Part III, Par. 1a). In addition, the Board was authorized to make "rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty" (Part III, Par. 1b); to "[a]dvise all departments and agencies on all problems relating to employee loyalty" (Part III, Par. 1c(1)); and to "[c]oordinate the employee loyalty policies and procedures of the several departments and agencies" (Part I, Par. 1c(3)).

The standard prescribed for the refusal of employment or the removal from employment on grounds relating to loyalty was that "on all the

evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States" (Part V, Par. 1).

Pursuant to Executive Order 9835, petitioner, a classified civil service employee in the Post Office Department, was served with a Notice of Proposed Removal Action on September 24, 1948 (R. 16, 19). This notice charged that "reasonable grounds exist for belief that you are disloyal to the Government" and set forth ten specifications (R. 16-17). Petitioner filed an answer, a hearing was duly held, and on September 6, 1949, the Department Loyalty Board found that reasonable grounds did exist for believing that petitioner was disloyal (R. 5). An appeal was then taken to the Postmaster General and, after a further hearing, the Postmaster General affirmed that finding (R. 5). Thereafter, petitioner appealed to the Loyalty Review Board. On November 2, 1950, the Loyalty Review Board concluded that reasonable grounds did not exist for believing that petitioner was disloyal and recommended that he be restored to his position. (R. 5). Petitioner was subsequently reinstated (R. 5).

On April 28, 1951, paragraph 1 of Part V of Executive Order 9835—the standard for refusal of employment or removal from employment—was amended by Executive Order 10241 (16 F.R. 3690). As amended, the standard to be applied was whether "on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States." The

amended standard readopted, in substance, the standard which had been in effect throughout World War II, *i.e.,* War Service Regulation II, Section 3 (issued by the Civil Service Commission in 1942, 7 F.R. 7723, 5 CFR (Cum. Supp.) 18.2(c)), which had provided that an applicant may be denied appointment if there is "a reasonable doubt as to his loyalty to the Government of the United States." See *Friedman* v. *Schwellenbach,* 159 F. 2d 22 (C.A. D.C.), certiorari denied, 330 U.S. 838.[1]

On May 23, 1951, pursuant to the authority vested in it by Executive Order 9835 to prescribe implementing rules and regulations and to coordinate the employee loyalty policies and procedures of the several departments and agencies (*supra,* p. 4), the Loyalty Review Board issued Memorandum No. 66 to all executive departments and agencies on the subject "Adjudication under the Standard Established by Executive Order No. 10241 of Loyalty Cases Determined and Closed Prior to May 1, 1951, under Executive Order No. 9835" (R. 6, Pet. App. 20-24). The Memorandum recited that the Board took into consideration the fact that department and agency heads have the power under Article II, Section 2, of the Constitution and the pertinent Acts of Congress to hire

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[1] The readoption of the earlier wartime standard had been expressly requested by the Loyalty Review Board and the Civil Service Commission in view of the Korean War and the declaration of a national emergency. See New York Times, February 15, 1951, p. 15, col. 2; *Id.,* April 29, 1951, p. 1, col. 7.

and fire employees and hence to review any loyalty case at any time in order to determine the qualifications of any individual for continued employment. It further noted that Executive Order 9835 expressly made the department and agency heads "personally responsible" for an effective program. Recognizing that it was its responsibility under the order to prescribe a method to insure uniform treatment of all cases, the Loyalty Review Board directed the departments and agencies to readjudicate under the new standard prescribed by Executive Order 10241 the following classes of cases: (1) all loyalty cases in which unfavorable decisions made by any board were reversed on appeal prior to May 1, 1951, if the individuals concerned are still employed; (2) cases in which favorable decisions were made but in which the evidence was sufficiently derogatory to warrant a review of the case by a panel of the Loyalty Review Board in its post-audit program; and (3) any other case which a department or agency head determines should be reviewed in order to assure himself that there is no person in his employ concerning whose loyalty there is a reasonable doubt (Pet. App. 20-24).

Pursuant to these instructions, on January 10, 1952 (R. 25), the Post Office Department Loyalty Board served petitioner with a new Notice of Proposed Removal Action (R. 21).[2] This new notice

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[2] According to the Complaint, petitioner had been on leave without pay status since September, 1949, except for a tour

charged that "there is a reasonable doubt as to your loyalty to the Government" (R. 22) and set forth the identical ten specifications contained in the 1948 notice (R. 22-23). Petitioner filed an answer and, after a hearing, the Department Loyalty Board, on August 7, 1952, found that there was a reasonable doubt as to petitioner's loyalty (R. 8-9). On December 9, 1952, the Postmaster General affirmed the findings and recommendations of the Department Loyalty Board (R. 9). A further appeal was then taken to the Loyalty Review Board. On April 2, 1953, after a hearing, the Loyalty Review Board affirmed the decision of the Postmaster General (R. 9). On April 10, 1953, petitioner was notified of his removal from the Post Office Department. (R. 9).

Thereafter, on May 18, 1953, petitioner commenced this action seeking a declaratory judgment and injunctive relief (R. 1-15). Petitioner contended that Executive Order 9835, as amended by Executive Order 10241, did not authorize the readjudication of petitioner's eligibility for continued employment (R. 14); that Executive Order 10241 accomplished no material change in the standard to be employed in loyalty adjudications (R. 39-41); that Loyalty Review Board Memorandum No. 66 was beyond the authority of the Board (R. 14); and that the order of separation, dated April 10, 1953, was accordingly void (R. 14).

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of duty from December 11, 1950 to December 31, 1950, in order to devote full time to his duties as a national officer of the National Alliance of Postal Employees (R. 3-4).

Respondents moved to dismiss on the grounds that the district court was without jurisdiction of the subject matter and that the complaint failed to state a claim upon which relief could be granted (R. 30). The district court granted the motion and dismissed the complaint (R. 45). The court below affirmed, one judge dissenting (R. 47).

ARGUMENT

Petitioner does not here challenge the validity of Executive Order 9835, which required removal from Federal employment where "reasonable grounds exist for belief that the person involved is disloyal" or the validity of the amendment thereto, Executive Order 10241, which required removal from Federal employment where "there is a reasonable doubt as to the loyalty of the person involved" (Pet. 9). Petitioner's basic position is that because Executive Order 10241 does not expressly direct that the amended standard be applied to individuals who had previously been cleared for continued employment under the superseded standard, the Postmaster General lacked authority to order petitioner's separation, following a new loyalty proceeding, despite concurrent findings of the Department Loyalty Board, the Postmaster General, and the Loyalty Review Board that there is a reasonable doubt as to petitioner's loyalty. As the well-reasoned opinion of the court below demonstrates (Pet. App. pp. 4-16), and as we show below, pp. 10-13, petitioner's supporting arguments are completely without merit. Also, since

Executive Orders 9835 and 10241 have been revoked and superseded by Executive Order 10450, 18 F.R. 2489, which established a new employee security program, the issues raised by the petition present no questions of continuing importance in this field.

1. Petitioner's argument that the standards prescribed by the two Executive Orders were the same is specious. On their face, they were markedly different. The ultimate fact to be determined under Executive Order 9835 was *disloyalty,* disloyalty which existed at the time of inquiry. The tense of the verbs used—"exist" and "is"—required that the "reasonable grounds" be in being at the time of determination. Accordingly, to warrant removal pursuant to Executive Order 9835, the evidence and the inferences to be drawn therefrom had to culminate in a justifiable conclusion of present disloyalty. In contrast, the ultimate fact to be determined under Executive Order 10241 was *loyalty,* not disloyalty. Also, Executive Order 10241 required removal if there was a reasonable doubt as to the loyalty of the person involved; it did not require the Board to go further and to make an affirmative finding of disloyalty. Stated otherwise, as the court below pointed out (Pet. App. p. 10), "the Board was no longer to be bound to inquire as to whether the proof reasonably was sufficient to convince and direct its understanding and to satisfy its reason and judgment as to disloyalty. Rather, the amended standard applied a more rigid test of suitability for government em-

ployment. It contemplated the possible existence of proof or information which, while not capable of inducing a belief that the person 'is disloyal,' does cause a reasonable doubt as to whether he is in fact loyal."

Not only are the two standards quite different both in language and in effect, but it must also be remembered that the sole purpose of Executive Order 10241 was to amend the standard prescribed by Executive Order 9835.[3] In replacing the standard found in Executive Order 9835 and repromulgating the World War II standard (see Statement, *supra,* pp. 5-6), the President surely did not intend a vain act.

2. Petitioner argues that Executive Order 9835, as amended by Executive Order 10241, did not authorize the Loyalty Review Board to direct the reconsideration of cases previously adjudicated under the prior standard. But the language of Executive Order 9835 is directly to the contrary. It expressly empowers the Board to make "rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty" (Part III, Par. 1b); to "[a]dvise all departments and agencies on all problems relating to employee loyalty" (Part III, Par. 1c (1)); and to "[c]oordinate the employee loyalty policies and procedures of the several departments and agencies" (Part I, Par. 1c(3)). Since depart-

[3] The text of Executive Order 10241 appears in note 6 of the opinion below, Pet. App. p. 14.

ment and agency heads have the power under Article II, Section 2, of the Constitution and the pertinent Acts of Congress to hire and fire employees, and hence to review any loyalty case at any time in order to determine the suitability of any individual for continued employment, and since Executive Order 9835 specifically made the department and agency heads "personally responsible" for an effective program (Part II, Par. 1), it was clearly the Board's function to issue Memorandum No. 66, advising the department and agency heads as to the types of cases to be readjudicated under Executive Order 10241, in order to coordinate employee loyalty policies and to achieve uniformity of treatment.

3. Petitioner's final contention is that re-examination of his eligibility for continued employment was precluded by the principle of *res judicata*. To begin with, it is well-settled that *res judicata* or collateral estoppel does not ordinarily apply to decisions of administrative agencies. *Niagara Mohawk Power Corp.* v. *Federal Power Comm'n*, 202 F. 2d 190, 198 (C.A.D.C.), affirmed, 347 U.S. 239, 248-249, fn. 12; cf. *Wallace Corp.* v. *National Labor Relations Board*, 323 U.S. 248, 253. This is particularly so where, as here, a change in the law has created an altered situation. *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 599, 601-602; cf. *State Farm Ins. Co.* v. *Duel*, 324 U.S. 154, 163. Further, as the court below pointed out, (Pet. App. pp. 12-13), "it is the continuing duty of any department or administrative agency to execute

its function in such fashion as may be required to effectuate its purposes and to accomplish its objectives." Cf. *Wilbur* v. *United States,* 281 U.S. 206, 217. In the instant case, the Executive branch unquestionably has the power to reconsider the standards to be applied in determining the suitability of federal employees. It is equally plain, we submit, that the Executive has the power to reconsider the suitability of an individual employee under the revised standard.

4. Moreover, the petition raises no question of importance in the future operation of the government employee security program. On April 27, 1953, subsequent to petitioner's removal, Executive Order 9835, as amended, was revoked and superseded by Executive Order 10450 (18 F.R. 2489).[4] Executive Order 10450 established new standards and procedures, based on considerations of security rather than loyalty, governing employment and retention in employment in the Federal service. In conformity with the purpose of the Act of August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-1 *et seq.*) (cited in the preamble of the order), which authorizes the summary suspension of employees in the interests of national security, Executive Order 10450 prescribes the current standard that the employment and retention in employment of all government officers and employees be "clearly consistent with the interests of the national secu-

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[4] The order became effective May 27, 1953, nine days after this suit was instituted.

rity" (Secs. 2, 5, 6, 7, 8). The Loyalty Review Board, whose authority to issue Memorandum No. 66 is challenged by petitioner, was abolished (Sec. 12).[5] Of particular pertinence here, Section 5 of the present order directs the readjudication of the case of any officer or employee where information is developed or received indicating that the retention of such officer or employee may not be clearly consistent with the interests of national security. In the light of these supervening events, further review would not appear to be warranted.

CONCLUSION

For the foregoing reasons, it is respectfully sumitted that the petition for a writ of certiorari should be denied.

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[5] In the circumstances, it is clear that this action is moot insofar as the respondent members of the defunct Loyalty Review Board are concerned.

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